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JAMES H. McKENNEY,
Clerk

No. 168.

Brf. of Phillips & McKenney for P. E.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Mar. 5, 1900.

No. 168.

Plaintiffs in Error

ELIZABETH S. OVERBY AND OTHERS, ~~Appellants~~

vs.

FANNIE H. GORDON.

Plaintiffs in Error

BRIEF FOR THE ~~APPELLANTS~~ IN REPLY UPON THE MOTION TO DISMISS.

The statute which authorizes writs of error to this court from the Court of Appeals of the District of Columbia,—so far as here important,—is as follows:

"Any final judgment or decree of the said Court of Appeals may be re-examined, &c., upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of $5,000, &c.; and also in cases, without regard to the sum or value of the matter in dispute, &c., in which is drawn in question the validity of a treaty or statute of—or an authority exercised under—the United States." (Act of 1893, ch. 74, sec. 8,—27 Stats., p. 436.)

There are consequently two well-known grounds, upon either of which, if the corresponding record make suitable showing, a writ of error may be justified: *i. e.* (1), a matter in dispute of more than $5,000 in value; or (2), a drawing in question of the validity of some statute, &c., of the United States.

The motion now in question apparently assumes as beyond doubt, that the *second* of these grounds does not exist here; and thereupon it is rested solely upon a want of proper value by the matter in dispute, viz., of one exceeding $5,000,—as required by the former.

We submit that the present writ may be supported upon either ground.

1. As for that assailed in terms by the motion.

The matter in dispute is, *the probate of a will covering property worth more than $9,000* (p. 11). No question arises, or can be determined, therein as to the several interests of the next of kin. Such determination must await some future and separate original proceeding;—no matter what may be the ending of the present one. The boundary betwixt the latter and those proceedings in which several persons claiming relief by different titles, &c., are joined for convenience in a suit in equity, is more plain than that betwixt a suit by next of kin for *distribution* and such supposed joint suit *for convenience*; and even in the latter case,—by next of kin for distribution,—it is held that the matter in dispute is *the*

whole estate. Much more strikingly is the-whole-estate such in a mere matter of *probate*.

As *an illustration* of a principle, we therefore submit that the present case concludes *a fortiori*, when compared with those either directly before this court or cited in New Orleans R. Co. *vs.* Parker, 143 U. S., 42, 51.

2. And even if the point submitted by our learned friends as above were against us, we should contend with confidence that *the present case draws in question the validity of a statute of the United States.*

We have at this point no temptation to differ with, or refine upon, that series of cases in which this court has shown that mere honest misconstruction, or casual indirect disparagement, of some United States statute, is not that *questioning of validity* required by the act above quoted.

But it has never been intimated at any point in that series, as we submit, that an evisceration of a statute may not, within that act, be its invalidation.

All of the parties to the caveat below, excepting Mrs. Overby, (and she had not resided within the District, and is besides a caveator,) are long-time and well-known residents of Georgia; and all of them as well as the supposed testator were born there, and the latter also had died there. A question arose after such death whether the deceased, who originally, during President Cleveland's first administration, had come to Washington to take office,—had not by remain-

ing here after his loss of place, *changed his residence* from Georgia to the District of Columbia.

The supposed will was propounded for probate in this District by one of the next of kin who was, substantially, its sole beneficiary; and the necessary orders were taken for making all other of these parties thereto. Accordingly, upon being notified they came in, and made substantially but one *issue*, viz., that the deceased at the time of his death was not a resident here, but a resident of Georgia.

As is well known, there is no system of formal pleading in courts of probate; and a proper way of pleading to the jurisdiction is by an issue like that just mentioned,—there as here having stated the matter both *negatively*,—as to the District; and *affirmatively*,—as to Georgia.

Whilst such issue was pending, (which assailed *directly* the jurisdiction *of the District itself*, and only through this that *of the court*,) one of the caveators resorted to the territorial jurisdiction asserted by these in the issue below,—and to the county in which the propounder then was, and for a long time had been, a prominent resident,—and in which the deceased had long lived before coming to the District of Columbia,—and in counties neighboring to which the caveators were living, as above; and took due steps for a reassertion there of the contention set up by them in the District,—and after due process of law challenged the propounder upon the same, and then duly applied for a finding in accordance with his suggestion:—whereupon in due course such finding was made, viz., that the deceased had died a resident of that county and State; and this was fol-

lowed by an appointment of the applicant as general administrator. *This proceeding, finding, and judgment has never been reversed, or even directly assailed.*

A proper transcript thereof having subsequently been offered in evidence upon the trial of the same issues in the court below, the learned justice presiding excluded it, upon the ground, as we understand it,—that whilst the record if admitted would necessarily have been fatal to the propounder's allegation of a residence within the District; yet, inasmuch as the applicant in Georgia had not upon such application informed the court there of the existence of the proceeding to which he had been made, and then was, a party *in invitum* within such District, some fault was thereby to be attributed to him such as would prevent his availing himself of that transcript,—and of its *faith and credit.*

(Our learned friends, in an appendix to their brief, have presented the language used by his honor on making the exclusion,—and we refer to that in correction of any misunderstanding that may chance to exist in our report of its substance, above.)

With all respect to the learned court below, we submit that a *preliminary* question arose upon the Georgia record, that excluded any consideration, or even suggestion, of the fault supposed.

Because, a judgment by default properly awarded (*here*, by a Georgia court of *superior* jurisdiction) is one that, as has been said, in substance, in the case of Last Chance Co.

vs. Tyler Co., 157 U. S., 683, quoted in our former brief, pages 13, 14,—is to be taken, as against the party defaulted, and in judgment, as being of no less weight for all matters substantial to its validity,—than if such party had appeared, and pleaded, and otherwise had ransacked the case of the successful party by every means within his power.

The present plight of the defendant in error is therefore not to be distinguished from one in which the finding in Georgia had been made after personal appearance, and strenuous contest upon her part.

It seems inconceivable that any fault or slyness, or contempt, is imputable to the caveators or any of them, because of their having openly challenged the propounder to maintain anew the issue of *residence* betwixt them, within a vicinage *common and even native, to all of them.* They had every reason to anticipate that such challenge would be accepted, and put to all possible proof. And it appears to have been, *at least*, as much the duty of the defendant in error to have alleged and proved within Georgia such pending proceeding in this District, as it was that of the plaintiffs in error.

We submit therefore that the action of the learned court below,—for all of its tone, and intention, no doubt of deference,—went to a direct invalidation of the statute in question: being in effect a confession and avoidance of its operation, as it were, which in point of principle is irreconcilable with wholesome allowance thereof.

The "comity" alluded to below in this connection is, as will be noticed, not *comity* betwixt courts of the same political jurisdiction, but betwixt different political jurisdictions themselves,—a shadowy thing at best in the face of an adverse transaction upon record (not *in fieri*, but already *factum*,) in a superior court of justice.

Records like that of the court in Georgia, of a matter already in judgment, cannot be made less of by suggesting doubts arising out of comity. Upon any such suggestion it would be assumed by other courts (*not of appeal*, at least,) that something had appeared before the court of the record, that had properly prevented an exercise of comity. This, as well as every other conceivable matter in support of the default, is to be taken for granted.

And as *local* jurisdictions within the United States are not to be allowed to build up, or even entertain, *local* customs in derogation of provisions by statutes of the United States,—much less can one such jurisdiction, by attributing to another like jurisdiction the existence of a certain comity,—to be exercised,—even although not demanded by any party to the case,—thereby make a footing for itself to disregard a *general* national institution of so great value to the purposes of private justice as that designated by the *faith and credit*" provisions of the Constitution of the United States, and section 905 of the Revised Statutes.

We therefore submit that even had the first ground of appeal failed us, the record shows a drawing in question of the validity of a statute, injurious to us in the courts below.

The other matters in contention we leave as presented by the former brief for the appellants: calling attention as well to the circumstance that we have not assigned *error* here in respect of the *alignment* below. That point was made in the supreme court of the District in deference to certain cases in the Maryland Reports which, upon the general statute held that caveators are quasi-plaintiffs. But after the Court of Appeals affirmed the ruling at trial, we were satisfied; and have not brought that matter up.

S. F. PHILLIPS,
F. D. MCKENNEY,
For the Plaintiffs in Error.

FEBRUARY 27, 1900.